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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DONALD RANDOLPH, Defendant and Appellant.	A122861 (Alameda County Super. Ct. No. C153867)

A jury found defendant Donald Randolph guilty of first degree murder involving the personal use of a firearm (Pen. Code, §§ 187, 12022.7, subd. (a)), and being a past-convicted felon in possession of a firearm (*id.*, § 12021, subd. (c)(1)). Defendant had previously entered a plea of guilty to a separate count of violating section 12021. The trial court sentenced him to state prison for a total term of 50 years to life.

On this timely appeal from the judgment of conviction, defendant raises a single contention, namely, that the trial court's response to a request from the jury for clarification regarding formation of the mental state of deliberation denied him his constitutional rights to due process and trial by jury. We conclude this contention is without merit, and affirm.

BACKGROUND

The victim, Aubrey Johnson, died over a misunderstanding about $150.

The evidence the prosecution introduced against defendant was extensive, but defendant does not argue that it was insufficient to support the jury's verdicts. The salient details may therefore be distilled to the following:

The victim had two children—one girl and one boy—with Plushette Johnson. At the time of the killing, March 5, 2006, the victim did not live with Ms. Johnson, although it seems he was welcome at her apartment. Defendant's brother lived in the same apartment complex. Defendant too was a familiar figure to Ms. Johnson and her children, visiting their apartment on almost a daily basis. Ms. Johnson had another son—Deante—with a different father. Deante viewed the victim as his stepfather. Relations between Deante and the victim were bad, very bad.

On the day of the killing, defendant was staying at the Johnson apartment. When the victim drove up to the apartment complex, he met defendant, who asked him for a ride. The victim agreed. Defendant was wearing a black "hoodie," that is, a sweatshirt with a hood. He had a gun with a silver/chromium finish that was given to him by Deante, who urged defendant to kill the victim. Defendant believed the gun was loaded. The victim's daughter heard a sound like a gun being cocked for firing.

By the time the victim had driven only several hundred feet, defendant's festering resentment about the $150 apparently boiled over. This sum represented half of the purchase price for a handgun defendant had sold to the victim in 2001. The victim had paid defendant $150, and promised to pay the other $150. The victim no longer had the weapon; apparently he told varying versions of how that came to be, i.e., it was sold for money, or thrown away during a police pursuit. Once inside the victim's car, defendant brought up the subject of the unpaid $150.

A fair inference from the testimony of the victim's daughter is that she saw defendant get out of the car, extend his arm, and fire more than once into the car. Later that day, the daughter told her mother—who was still in jail—that defendant shot her father. Three nearby residents saw a man wearing a hoodie repeatedly fire a silver handgun at a car. Defendant went back inside the apartment, sat on a bed, returned the weapon to Deante, saying he "had two bullets left" and was hungry. When defendant told Deante that he had shot the victim, Deante responded, "I don't give a fuck about him." Defendant left when his cousin came by and picked him up.

The victim's autopsy showed that four bullets hit or grazed the victim's right arm. One of the bullets passed through the arm and then through the left leg, another passed through the right armpit and lodged near the victim's spine, and a third caused damage to the diaphragm. The cause of death was multiple gunshot wounds.

One shell casing was found inside the victim's vehicle. And eleven casings were found on the ground in two groups a significant distance apart. All of the shell casings, and the three bullets recovered from the victim's body, were from the same .40 caliber weapon. The gun defendant brought from the apartment was .40 caliber and held 17 cartridges.

Defendant was arrested on July 3, 2006.[1] He was interrogated twice by police the following day after receiving the admonitions required by *Miranda v. Arizona* (1966) 384 U.S. 436. Tape recordings of the interviews were played for the jury, and the recordings were admitted in evidence.[2]

Although defendant initially denied shooting the victim, he later admitted responsibility. The gist of the narrative related by defendant during the interviews was that when defendant got into the car he had no intention of shooting the victim. Whatever it was that the victim said concerning the fate of the weapon he obtained from defendant, defendant took it to be a lie. He demanded the victim "shoot me something," that is, "give me some money." The victim became angry and punched defendant in the face. According to defendant, "I seen him raise up his hand again and I [didn't] want to

[1] When arrested, defendant was armed. The gun possession charge defendant admitted was alleged to have occurred on this date.

[2] Defendant made an in limine motion to suppress any statements elicited during the interview on the ground that they were involuntary and thus their admission would constitute a violation of due process. The trial court conducted an evidentiary hearing on the motion, and denied it. At the same time the trial court granted a prosecution motion to allow the jury to hear a recording of the jailhouse conversation between Ms. Johnson and her daughter. This recording was also heard by the jury and admitted in evidence.

get hit. So, I started shooting him."[3] He did not intend to kill. Defendant fired more than twice and then jumped out of the car. Defendant continued firing until the car came to rest against a fence. He first told police he did not fire any more shots after leaving the car, but he later told them, "I just knew that if I let him get away, he was going to get me, so I just kept shooting." When asked "So was your point when you kept shooting to make sure he was dead?", defendant told the police "Yes."

The theory of the defense at trial was that defendant had absolutely no involvement in the shooting. Defendant so testified. He admitted he was in the Johnson apartment, but only heard gunshots shortly after Deante went outside.[4] The gun he gave to the victim was a gift for which he never expected payment. The explanation for the incriminating statements he made to police was that they were false, made only after he was told that he would be prosecuted only for a gun charge and that his confession would secure the release of his father from jail. The defense also presented expert testimony as to how a false confession could be elicited.

DISCUSSION

The jury began deliberating at approximately 9:15 a.m. At 12:50 p.m., the court received this note from the jury: "Request clarification of premeditation for 1st (vs 2nd) degree murder: Does defendant have to have had intent to kill before firing 1st shot? Or could he have developed that intent after the 1st shot (before subsequent shots) and still be considered premeditated." After conferring with counsel, the court returned the jury's written request with this "Answer: See Instruction § 521." The jury returned its verdict two and one-half hours later, at 3:25 p.m.

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[3] At defense counsel's express request, the jury was not instructed on self-defense; counsel stated it was a strategic decision not to give the jury the option of convicting defendant of voluntary manslaughter.

[4] In his opening brief, defendant asks this court to take judicial notice that the victim's other son "is currently being prosecuted for murder in the Contra Costa County Superior Court, case no. 04-161207-6." There being no showing of relevance or good cause, and because this request is not in the required form, it is denied. (See Cal. Rules of Court, rule 8.54(a); Ct. App., First Dist., Local Rules of Ct., rule 9, Judicial Notice Requests.)

The cited instruction, CALCRIM 521, as modified at the prosecution's request, was given to the jury as follows:

"If you decide that the defendant has committed murder, you must decide whether it is murder of the first or second degree.

"The defendant is guilty of first-degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted willfully if he intended to kill. The defendant acted deliberately if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with premeditation if he decided to kill before committing the act that caused death.

"The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection. The length of time alone is not determinative.

"To prove the killing was 'deliberate and premeditated', it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his act—his or her act.

"All other murders are of the second degree.

"The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first-degree murder."

Under the general heading, "The trial court's inadequate response to the jury's request for clarification denied appellant his constitutional rights to due process and trial by jury," defendant presents two arguments.

First, he argues that "the trial court did not adequately answer the jury's inquiry." Dividing the attack on the victim into two parts, and citing parts of his recorded

statements to police, defendant posits that only the shots he fired after he left the victim's vehicle were fired with the deliberate intent to kill. As he reasons, "the jury expressed uncertainty about the findings of fact required by the elements of first degree murder. The court's instructions allowed them to find each element proved if they concluded that Randolph initially shot [the victim] from the passenger seat *without deliberation*, but subsequently fired from the street *with deliberation* (i.e., after carefully weighing the relevant considerations and consequences) out of fear of what would happen to him if [the victim] survived."

There is nothing in the record which sustains the surmise that the jury did in fact make the chronological distinction defendant discerns. That distinction obviously did not figure in the defense's closing argument, which was predicated on defendant's testimony that he did not fire any shots at the victim, that his ostensible confession was not credible, and that it was far more likely that Deante was the actual killer.

In addition, defendant reads the record only in a sense that is *favorable* to him. He assumes the validity of those portions of his confession in which he disclaimed any intent to kill the victim until he was out of the car. Leaving aside the apparent contradiction of his now relying on the confession he so vigorously attacked during the trial, there is nothing that would preclude the jury from viewing the evidence differently. Reading the evidence, as we must, *against* defendant (*People v. Moon* (2005) 37 Cal.4th 1, 22), the jury could conclude that defendant set out to kill. That would explain his arming himself with a loaded and cocked weapon before entering the victim's car. The jury could conclude that the fear of the victim's retribution which defendant said was his motivation *after* he left the car, in fact existed *before* he got into the car.

As for the supposed failure to clarify, it was not perceived by defense counsel, who did not object to the court's response. Nor did the jury appear to find the court's response unhelpful.[5]

[5] Anticipating that we might find the issue waived because his trial counsel failed to object, defendant argues that counsel's failure to protest the trial court's response to the jury's request establishes ineffective assistance of counsel. But counsel would have

Second, defendant argues that "the court had a duty to provide adequate clarification of the law." But CALCRIM 521 needs no clarification because it correctly states the law on deliberation and premeditation. (E.g., *People v. Halvorsen* (2007) 42 Cal.4th 379, 419; *People v. Bolin* (1998) 18 Cal.4th 297, 332.) This part of the instruction is derived from CALJIC No. 8.20, which our Supreme Court repeatedly held to be a correct statement of the law. (*People v. Millwee* (1998) 18 Cal.4th 96, 135, fn. 13; *People v. Perez* (1992) 2 Cal.4th 1117, 1123; *People v. Lucero* (1988) 44 Cal.3d 1006, 1021.)

In any event, the part of CALCRIM 521 defendant finds objectionable—"The defendant acted with premeditation if he decided to kill before committing the act that caused death"—parallels the language used for deliberation: "The defendant acted deliberately if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill." Considering as we must the entirety of the instruction from the perspective of whether a reasonable jury would misunderstand its import (*People v. Huggins* (2006) 38 Cal.4th 175, 192; *People v. Smithey* (1999) 20 Cal.4th 936, 963), defendant does not persuade us that a jury would somehow conclude that premeditation, but not deliberation, was required to precede "the act that caused death." CALCRIM 521 treats the two concepts as largely synonymous and contemporaneous. ("The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate *and* premeditated. The amount of time required for deliberation *and* premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate *and* premeditated." (Italics added.)) So does our Supreme Court. (E.g., *People v. Manriquez* (2005) 37 Cal.4th 547, 576-577 [" ' "while premeditation and deliberation must result from ' "careful thought and weighing of considerations" ' [citation], we continue to apply the principle that '[t]he process of

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had an obvious, and sound, reason for not objecting, because it would have made a complete hash of the theory of defendant's complete non-involvement relied upon during the trial.

premeditation and deliberation does not require any extended period of time. . .' " ' "].) And so apparently does defendant. As noted by the Attorney General, the jury's note asked about premeditation, but defendant treats it as evidencing confusion about deliberation.

In light of the foregoing, we conclude, and hold, that there is no reasonable likelihood the jury misapprehended CALCRIM 521 in the manner asserted by defendant. (See *People v. Cain* (1995) 10 Cal.4th 1, 36-37.)

DISPOSITION

The judgment of conviction is affirmed.

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Richman, J.

We concur:

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Haerle, Acting P.J.

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Lambden, J.